UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

The Secretary, United States Department of Housing and Urban Development, on behalf of Housing Opportunities Made Equal, Inc., Charging Party, v. Active Agency, Inc., Jeffrey C. Peters, Thomas P. Brady, Ruth Leo, and Joseph Matusek, Respondents.

HUDALJ 02-96-0373-8

Decided: September 22, 1999

Dennis J. Bischoff, Esq.
For the Respondents

Sara Manzano, Esq.,
Louis Smigel, Esq., and
Nicole C. Chappell, Esq.
For the Secretary and
The Aggrieved Party

Before: ROBERT A. ANDRETTA
Administrative Law Judge

INITIAL DECISION

Jurisdiction and Procedure

This matter arose as a result of a complaint filed by Housing Opportunities Made Equal, Inc. ("HOME" or "Complainant"), an "aggrieved person" under the Fair Housing

Act, as amended, 42 U.S.C. §§ 3601, *et seq.* ("the Act"), alleging discrimination on the basis of familial status. On December 18, 1998, the Secretary of Housing and Urban Development ("the Secretary") issued a Determination Of Reasonable Cause And Charge Of Discrimination on behalf of HOME in which it is alleged that the Respondents are responsible for discriminatory refusal to rent or sell and discrimination in advertising, based upon familial status, in violation of the Act.

The Charge specifically alleged that Respondents violated the Act "by refusing to rent, or sell after the making of a bona fide offer, or refusing to negotiate for the rental or sale of, or otherwise made unavailable or denied, a dwelling based upon familial status," which act is prohibited by the statute that is codified at 42 U.S.C. §3604(a) and the regulations that are found at 24 CFR 100.60(a)(b)(2) and (4). The Charge further alleged that Respondents violated the Act "by making, printing or publishing, or causing to be made, printed or published statements and advertisements, with respect to the rental or sale of a dwelling that indicated a preference, limitation, or discrimination based on familial status," which act is prohibited by the statute that is codified at 42 U.S.C. § 3604(c) and the regulations that are found at 24 CFR 100.75(b)(c)(1)(2) and 109.20. The Charge alleged in addition that Respondents "engaged in unlawful conduct relating to the provision of housing which otherwise made unavailable or denied a dwelling to a person because of familial status," which violates the regulation found at 24 CFR 100.50 (b)(3).

A hearing was held in Buffalo, New York, on June 17, 1999. The parties' post-hearing briefs were to have been filed by August 9, 1999. However, I granted the Secretary's unopposed motion to extend the time for submission of post-hearing briefs to August 16, 1999. The parties' post-hearing briefs were then timely filed, and this case therefore became ripe for decision on the last named date. It is adjudicated in accordance with Section 3612(b) of the Act and the regulations of the Department of Housing and Urban Development ("HUD") that are codified at 24 CFR Part 104, and jurisdiction is thereby obtained.

Statement of Facts

1. Complainant HOME is a non-profit corporation, organized under the laws of the State of New York, whose goal is to make equal opportunity in housing a reality in Niagara County. (S-1).[1]

[1] The Secretary's exhibits are identified with an S and the exhibit number. The Respondents'

exhibits are identified with an R and the number. References to the transcript of the hearing are made with a T and the transcript page number.

2. Respondent Active Agency, Inc., of Akron, New York, is a Sub-S corporation which was the real estate agency retained by the seller of the mobile home which is the subject of this case. (T 143, 145, 168).[2]

3. Respondent Jeffrey C. Peters is and has been the owner of Active Agency since 1988, and he maintains the books and records of the agency. (T 145, 168).

4. Respondent Thomas P. Brady is and has been the broker and licensed real estate agent for Active Agency since 1988. (T 192-3). He has been a licensed real estate agent in New York since 1983. (T 182). Brady is also the office manager for Active Agency and, in that capacity, he prepared the procedures manual which sets out the standard procedures and types of activities expected of Active's employees, brokers and agents in the sale and rental of real estate. (T 156, 182, 210).

5. Respondent Joseph Matusek is and has been a real estate agent with Active since 1988. (T 238).

6. Respondent Ruth Leo is and has been a real estate agent with Active since 1981. (T 210, 225).

7. Active Agency was the agent for the seller of a one-bedroom mobile home which became the subject of this case on April 20, 1995. (T 168, 197). The trailer was situated in Antone's trailer park, which was owned by Vincent J. and Joan R. Antonicelli, who had a "preference for seniors" as residents of the park. (T 227, 230, 247).[3] At the

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[2] Where the present tense is used it refers to conditions as they existed at the time of the hearing.

[3] No complaint was filed against the seller of the trailer, Virginia Price. The Antonicellis were identified as the mobile home park owners by Active Agency on August 5, 1996, and a complaint was filed against them on January 16, 1998. Notification of the complaint was sent to the Antonicellis on January 22, 1998. The regulation that is codified at 24 CFR 103.42 provides that a person may be joined as an additional Respondent. However, 24 CFR 103.50 provides that it must be done within ten days of the identification of the person. Thus, the Antonicellis were dropped as Respondents in this proceeding.

time that this case arose, all of the trailer spaces in the park were occupied by at least one person 55 years of age or older, except for the one occupied by the subject trailer, which was vacant. (R 6).

8. In April, 1995, a HOME testing coordinator read in the April 20, 1995, *Akron Bugle* an advertisement for the subject trailer that identified Active Agency as the agent for sale of the trailer and stated within the description of the trailer the "pull phrase" that it "makes a great retirement home." (T 64, 197-8). Other advertisements placed on other

dates by Active Agency to draw interest in the trailer used pull phrases other than that it would make a good retirement home. They were that the trailer was "cozy" (T 197), that it was "enclosed by trees" (T 201), and that it had "new carpeting and furnace" (T 201).

9. Tester number one posed as a 27 year old potential purchaser, with a nine-month old child and $4,000 in savings. (T 101-2). She called Active Agency where the phone was answered by Respondent Matusek. In the conversation that ensued, Tester One volunteered the above-mentioned information as well as her name, none of which was requested by Respondent Matusek. (T 115).

10. Tester One asked whether Matusek would be showing the trailer, whereupon he told her that the owner of the park preferred senior citizens and that she would have to get the owner's approval. (T 116).[4] He gave her directions to the park, but he did not offer to show her the trailer and he did not ask her for additional information to give to the listing agent. (T 115-16; 256-57). Matusek also stated that Tester One would have to be financially "qualified" to buy the property before it would be shown to her, a process not ordinarily required by Active Agency. (T 256, 258).

11. On or about April 26, 1995, a second HOME tester telephoned Active Agency, expressing an interest in the advertised mobile home. (T 126-27). Tester Two posed as a woman in her fifties without children. She inquired about the terms of purchase for the trailer and the rent and fees that would have to be paid to the mobile home park. (T 128). Respondent Ruth Leo identified the trailer as her listing and informed Tester Two that the park was very small and that senior citizens lived there. (T 128).

12. Tester Two then inquired whether being in her fifties would disqualify her, and

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[4] From the testimony of Tester One and Respondent Matusek, it is clear that some misunderstanding arose in this conversation with regard to the terms "seller" and "owner." Tester One thought she was being told that the seller of the trailer preferred to sell to seniors and that she should go see the seller by herself. However, she was being told that the owner of the trailer park preferred seniors and that she would have to gain the park owner's approval before purchasing the trailer.

Leo responded that the park "really can't exclude because they don't have any senior recreation or facilities." (T 129, 227). Leo also told the tester that "they try to keep kids out because the park is so small." (T 129). After Tester Two confirmed that she had no children Leo allowed as how it would not hurt for her to try to purchase the trailer because "maybe they'll make an exception." (T 129).[5] After the conversation, Leo mailed a copy of the listing and one of her business cards to Tester Two. (T 130).

13. Agents working at Active Agency receive training, including training in fair housing laws. (T 153).

14. After the events of this case, the trailer remained available for some time, and it was eventually abandoned by the seller, who could no longer afford the costs. (T 241-42).

Discussion

A *prima facie* case of discrimination in this matter is established by proving (1) that the aggrieved party belongs to a protected class; (2) that the aggrieved party sought and was qualified to purchase available housing; (3) that the aggrieved person was denied the housing or the housing was otherwise made unavailable to the aggrieved person; and (4) that the housing remained available thereafter. *Frazier v. Rominger*, 27 F.3d 828 (2nd Cir. 1994); *Cabrera v. Jakabovitz*, 24 F.3d 372, 377 (2nd Cir. 1994).

HOME is a qualified aggrieved person under the Act. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-75, 378-79). HOME testers, like other fair housing testers, are individuals who, without the intent to rent or purchase housing, pose as prospective renters and purchasers for the purpose of collecting evidence of discriminatory housing practices. *Cabrera*, at 377 n.1, *supra*. Housing organizations and testers who merely seek information about the availability of dwellings to determine whether discriminatory housing practices are occurring also fall within the category of aggrieved persons under the Act. 53 *Fed. Reg.* 44995 (Nov. 7, 1988); *see also* Preamble II, 24 CFR ch. 1, subch.

[5] It is not clear why Leo appeared to believe that Tester Two would have to seek an exception since the latter fit the profile of current residents and the park owners' preference.

A, app. I, *Fed. Reg.* 3238 (Jan. 23, 1989). Thus, even Tester One's superficial inquiries were enough to qualify her and HOME as parties who "sought" housing.

Tester One identified herself as a young woman with an infant and asked Matusek if he would be showing the trailer. Instead of answering the question asked, real estate agent Matusek stated that the trailer park owners preferred senior citizens in the park and that she would need to get the owners' approval. This effectively told her that the trailer was not available to her, nothwithstanding that the seller of the trailer made no such limitations and that Matusek represented the seller rather than the park owners. Matusek's later claim that he did not show the trailer to Tester One because she was not "qualified" by a financial institution fails to make the grade as a legitimate, nondiscriminatory reason for making the housing unavailable to Tester One. It is not only outside the normal course of real estate business but is also a procedure unknown to Matusek's own colleagues at Active Agency. Thus, it is a pretext not supported by credible evidence. *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742, 2747 (1993); *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). Finally, that the trailer remained available after the events leading to this case is undisputed.

Thus, Respondent Matusek made the trailer unavailable to Tester One in violation of the Act and of HUD's regulation codified at 24 CFR 100.804(a). Both he and Respondent Leo also violated the regulation codified at 24 CFR 100.804(c) by making statements to both testers that indicated a preference for senior citizens, and in Leo's conversation with Tester Two, that indicated a limitation of the availability of the property to people without children. Matusek told Tester One that the owners of the park "wanted to keep it senior citizen" and that it was "a senior citizen park." Leo stated to Tester Two that "senior citizens live there" and "they try to keep kids out because the park is so small." Leo's additional statements that the park "really can't exclude because they don't have any senior recreation or facilities"[6] and that "it would not hurt" Tester

[6] Respondent's reference here is presumably to HUD's now superseded regulation, "55 or older housing," which was codified at 24 CFR 100.304 (1995). That regulation provided an exception from the provisions of the regulation regarding familial status, for housing intended and operated for occupancy by persons 55 years of age or older. To qualify for the exception, a housing facility had to show either that it had significant facilities and services specifically designed to meet the physical or social needs of older persons, in accordance with subsection (b)(1), or, in accordance with subsection (b)(2), that it was not practicable to provide such facilities and services, and the housing facility in question is necessary to the community because it provides important housing opportunities for older persons. Under the new regulation on this subject that is found at 24 CFR 100.304 (1996) the exception from the provisions of the regulation regarding familial status for housing intended for persons 55 years of age or older is effective so long as the facility in question is at least 80 percent occupied by persons of that age or older. This new regulation, under which the trailer park in this case would have qualified for the exception as housing for older persons, became effective on April 25, 1996, nearly three years before the Charge was issued and only eight days after the Complaint was filed. (See note 8).

Two to try to purchase the home because "maybe they'll make an exception" do not redeem her from the preference and limitation previously stated because they do not negate the statement of preference for senior citizens or the statement that the park excludes children.

Respondents Peters and Brady cannot escape liability by describing the sales agents as "independent agents." The relationship among the owner of Active Agency, the agency itself, its broker, and its sales agents is an agency relationship. *Chicago v. Matchmaker Real Estate Sales Center*, 982 F.2d 1086 (7th Cir.1992), citing *Walker v. Crigler*, 976 F.2d 900 (4th Cir. 1992); and see *Heights Community Congress v. Hilltop Realty, Inc.*, 774 F.2d 135 (6th Cir. 1983), *cert denied*, 475 U.S. 1019, 106 S. Ct. 1206 (1985). Whether an agency relationship exists for purposes of the Fair Housing Act is a question of federal law. *Cabrera v. Jakabovitz*, 24 F.3d 372 (2nd Cir. 1992).

A real estate firm and its brokers and owners may be held liable for the discriminatory acts of the firm's agents, whether or not they directed or authorized the particular acts. *Cabrera* at 389. The law imposes liability in such cases because it would be too easy for the broker or the owner to plead ignorance when an agent violated the Act. This would leave the broker and owner with little incentive to adequately manage and educate the employee agents or to ensure their work is free of discrimination. *Id.*

Respondent Brady was not only Active's broker, but he was the office manager. He authored the procedures manual which sets out the standard procedures and activities expected of Active's agents and other employees. All of the Respondents who testified stated that they were bound to act in conformity with the manual in the conduct of their activities. The agents were only permitted to conduct their business through Active, which retained their licenses. Respondent Peters also stated that he and Brady had full authority to discipline, or even fire, the agents.

Peters is the owner of Active, Brady is the broker at Active, and Matusek and Leo are agents at Active. Thus, all of the Respondents are jointly and severally liable for the actions and statements found above to be unlawful.[7]

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[7] Had Antone's Mobile Home Park or the Antonicellis themselves been included as Respondents in the case, it is likely they would have invoked old regulation 24 CFR 100.304(b)(2) (1995) in their defense. For qualification for the exception under this subsection to be successfully argued, they would have had to show that it was impracticable to provide significant facilities and services for older persons and that their park was an important part of community housing for seniors. The named Respondents in this case had the same defense available to them. That is to say, had the Respondents shown the trailer park to be qualified for the exception their statements would not have been violative of the Act. However, this was not argued, and insufficient facts were entered into the record for me to infer that the trailer park qualified for the exception.

REMEDIES

The Secretary seeks damages to recover "HOME's expenses, injury to HOME's members, and frustration of HOME's purpose." HOME seeks the following: $50.00 in tester stipends; $80.00 for the testers' appearances at the hearing; $2,612.50 for HOME's time spent related to this matter; $2,250.00 for future monitoring of Active Agency, Inc.; and "reasonable compensation for the three-to-four year diversion of resources, after reasonable, inexpensive and expeditious resolution could not be reached with respondents, prior to the complainant's filing of the HUD-903 complaint." An amount for "injury to HOME's members, and frustration of HOME's purpose" is not suggested. In addition, the Secretary requests the imposition of a civil penalty in the amount of $5,000.00 and a permanent injunction against the Respondents ever again discriminating against families with children.

Compensatory Damages

The Act provides that where an administrative law judge finds that a Respondent has engaged in a discriminatory practice, the judge shall issue an order "for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person." 42 U.S.C. § 3612(g)(3). The damages may be awarded for compensation for actual expenses and for diversion of resources. *HUD v. Wilkowski*, FH-FL ¶ 25,045 (HUDALJ, May 18, 1993). The Secretary argues for both.

The amounts shown above for actual expenses are reasonable and within the law. Thus, $2,742.50 will be awarded as part of the Order at the end of this Initial Decision. The $2,250.00 requested for future monitoring is speculative. Moreover HUD's own personnel will be directed to monitor the Respondents' future activities. Thus, this amount will not be included in the Order.

An amount for the alleged diversion of resources is not suggested and, moreover such compensation appears, from the Secretary's wording of the request, to be derived from the aggrieved party's attempts to settle the case. HOME has "failed to set forth specific evidence demonstrating that its various programs have been 'perceptively impaired as a result of the diversion of its resources ... to activities counteracting [the] ... discriminatory acts'." The expenditure of HOME resources on an educational program or other activity to counteract the acts of the Respondents in this case is not shown. *See Fair Housing Counsel v. Montgomery Newspapers*, 141 F.3d 71 (3rd Cir. 1998). For these three reasons, no compensation for diversion of resources will be ordered.

Civil Penalty

The Charging Party has also asked for the imposition of a civil penalty of $5,000 for each Respondent. The maximum that can be imposed on a Respondent who has not been adjudged to have committed any prior discriminatory housing practices is $11,000. 42 U.S.C. § 3612 (g)(3)(A); 24 CFR 180.670(b)(3)(iii). In accordance with the last-cited regulation, determination of an appropriate penalty requires consideration of five factors: 1. the nature and circumstances of the violation; 2. the degree of the Respondent's culpability; 3. the goal of deterrence; 4. whether the Respondent has been previously adjudged to have committed unlawful housing discrimination; and 5. the Respondent's financial resources.

There is no evidence that Respondents have been previously found to have committed a discriminatory housing practice. Thus, $11,000 each is the maximum that can be imposed in this case. The nature and circumstances of the violations of the Act in this case are of a lower order than frequently found in cases of violation of the Fair

Housing Act. Both phone conversations contained only cursory inquiries about the subject trailer. Neither tester expressed a real interest in buying it or even considering buying it. Neither specifically asked to see it or asked what needed to be done to purchase it. Likewise, the responses from the two real estate agents were also fairly cursory. Thus, little was done in violation of the Act, and the penalty should match the low order of the violation.

As to culpability, the Respondents are real estate professionals, and as such they knew or should have known that the mobile home park owners' preference for seniors and exclusion of children should not be stated. All have, by their own testimony, received fair housing training and have been in the real estate business for over ten years. However, as a practical matter, as representatives of the seller of an individual trailer, it is not totally unreasonable for an agent to alert a prospective applicant to the fact that he or she may run into an application problem when it comes time to rent the space that the trailer occupies.

Assessment of a civil penalty sends a message to the Respondents penalized, and to others, that the United States Government will not tolerate discrimination against any individual on the basis of familial status. The congress approved the Act that would have made the acts of the Respondents lawful less than a year before the facts of this case arose.[8] Thus, it does not seem fruitful to seek with any strength, deterrence from activity which is now lawful. This also weighs in favor of a minimal penalty.

There was not sufficient evidence on which to base an accurate assessment of the various Respondents' financial circumstances, and it is, of course, their burden to show that a penalty would be an undue hardship. However, from their description of the amount of business they do each year in a small town and rural setting, including the sale of one-bedroom trailers, they would appear not to be wealthy in the ordinary sense of the word. In any event, the considerations above support the imposition of only a minimal penalty.

Finally, the Secretary did not offer argument persuasive of the view that a civil

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[8] The applicable change to the Act was approved on December 28, 1995, as the Housing For Older Persons Act (HOPA), Pub. L. 104-76, 109 Stat. 787. Regulations implementing the change were issued by HUD on April 26, 1996. The facts of the instant case arose in April, 1995.

penalty of $5,000.00 should be imposed. Given this fact, the considerations above, and a general assessment of the facts and handling of this case, a civil penalty of $50.00 appears appropriate and that amount will be part of the Order that follows.

Injunctive Relief

That part of the Fair Housing Act that is codified at 42 U.S.C. § 3612(g)(3) also authorizes the Administrative Law Judge to order injunctive or other equitable relief. Injunctive relief may be imposed to ensure that the Respondents will not again discriminate on the basis of familial status. To that end, the Charging Party has requested that I enter a permanent injunction against Respondents that restrains them from further violations of Title VIII and appropriate affirmative relief to protect against recurrence of the Respondents' discriminatory conduct. This request is well taken, however, the Charging Party has not provided any guidance as to the nature of the relief requested. Thus, injunctive relief of this forum's own design will be set forth as part of the Order that follows.

ORDER

Having concluded that Respondents Active Agency, Inc., Jeffrey C. Peters, Thomas P. Brady, Ruth Leo, and Joseph Matusek violated provisions of the Fair Housing Act that are codified at 42 U.S.C. §§ 3604(a) and (c), as well as the regulations of the U.S. Department of Housing and Urban Development which are codified at 24 CFR 100.60, 100.75, and 109.20, respectively, it is hereby

ORDERED that,

1. Respondents are permanently enjoined from discriminating against the Aggrieved Parties, HOME and its testers named herein or other testers, or any other person, with respect to housing, because of familial status, and from retaliating against or otherwise harassing them or any of their families.

2. Respondents shall institute record-keeping of the operation of the subject agency which is adequate to comply with the requirements set forth in this Order, including keeping all records described in paragraph 3 of this Order. Respondents shall permit representatives of HUD to inspect and copy all pertinent records at reasonable times after reasonable notice.

3. On the last day of every third month beginning January 31, 1999, and continuing for three years, Respondents shall submit reports containing the following information regarding the previous three months, for all properties listed for sale or rent by Respondents, to HUD's Office of Assistant General Counsel for New York/New Jersey, 26 Federal Plaza, New York, New York 10278-0068, provided that the Assistant General Counsel may modify this paragraph of this Order as deemed appropriate to make its requirements less, but not more, burdensome:

a. a duplicate of every written application, and written description of every oral application, for all persons who applied for rent or purchase of all Respondents' listed units, including a statement of each person's familial status, whether the person was rejected or accepted, the date of such action, and, if rejected, the reason for the rejection;

b. a list of vacancies at all Respondents' managed housing units, including the departed person's familial status, the date of termination notification, the date moved out, the date the unit was next committed to occupancy, the familial status of the new occupant, and the date that the new occupant moved in;

c. current occupancy statistics indicating which of Respondents' listed housing units are occupied by families or groups including at least one younger than 18 years of age;

d. sample copies of advertisements published or posted during the reporting period, including dates and what, if any, media was used, or a statement that no advertising was conducted;

e. a list of all persons who inquired in any manner about renting or buying one of Respondents' listed housing units, including their names, addresses, familial status, and the dates and dispositions of their inquiries; and

f. a description of any rules, regulations, leases, or other documents, or changes thereto, provided to or signed by any applicants for rental or purchase of housing units listed by Active Agency.

4. Respondents shall inform all their agents and employees, including any officers and board members of their businesses, of the terms of this Order and shall educate them as to these terms and the requirements of the Fair Housing Act.

5. Within forty-five days of the date on which this Initial Decision and Order is issued, Respondents shall pay damages in the amount of $2,742.50 to HOME to compensate it for the costs that resulted from Respondents' discriminatory activity.

6. Within forty-five days of the date that this Initial Decision and Order becomes final, Respondents shall pay a civil penalty of $50.00 each to the Secretary, United States Department of Housing and Urban Development.

7. Within fifteen days of the date that this Order becomes final, Respondents shall submit a report to HUD's Office of Assistant General Counsel for New York/New Jersey that sets forth the steps it has taken to comply with the other provisions of this Order.

This Order is entered pursuant to the applicable section of the Fair Housing Act, which is codified at 42 U.S.C. Section 3612(g)(3), and HUD's regulation that is codified at 24 CFR 180.680, and it will become final upon the expiration of 30 days or the affirmance, in whole or in part, by the Secretary for Housing and Urban Development within that time.

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ROBERT A. ANDRETTA
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of this INITIAL DECISION issued by ROBERT A. ANDRETTA, Administrative Law Judge, in HUDALJ 02-96-0373-8, were sent to the following parties on this 22nd day of September, 1999, in the manner indicated:

_____
Chief Docket Clerk

REGULAR MAIL:

Scott Ghel
Housing Opportunities Made Equal, Inc.
700 Main Street
Buffalo, NY 14202-2909

Dennis J. Bischof, Esq.
Law Offices of Michael T. Hagelin
135 Delaware Avenue, Suite 200
Buffalo, NY 14202

Nicole K. Chappell, Esq.
Office of Counsel
U.S. Department of Housing and
Urban Development
26 Federal Plaza, Room 3500
New York, NY 10278-0068

INTEROFFICE MESSENGER:

Eva M. Plaza, Assistant Secretary
for Fair Housing and Equal Opportunity
U.S. Department of Housing and Urban Development
451 7th Street, S.W., Room 5100
Washington, D.C. 20410

Harry L. Carey, Assistant General Counsel for Fair Housing
Jonathan Strong, Deputy Assistant General Counsel
for Fair Housing Litigation
U.S. Department of Housing and Urban Development

451 7th Street, S.W., Room 10270
Washington, D.C. 20410